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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

DORNIER GMBH, a German Corporation, *Petitioner,*

v.

DONALD E. ELLIOTT and EVELYN L. ELLIOTT, individually and as Personal Representatives of the ESTATE OF SCOTT v. ELLIOTT, DECEASED, BUSH AIR, INC., an Alaska corporation, and WIEN AIR ALASKA, INC., an Alaska corporation, *Respondents.*

DORNIER, A. G., and DORNIER, GMBH, *Petitioners,*

v.

AVONNA L. SWEANEY, Personal Representative of the ESTATE OF GARY B. ROBERTS, BUTLER AVIATION COMPANY, HOME OIL COMPANY, LIMITED, FIELD AVIATION COMPANY, LIMITED, CLIFFORD L. SHORT, RAY E. FERGUSON, FRANK P. FERGUSON, DON FERGUSON, JOE FERGUSON, DON'S SAFARI FLYING SERVICE, KOTZEBUE FLYING SERVICE, INC., ALASKA CENTRAL AIRWAYS, INC., GEORGE GRANT, and AIRPARTS, INC., *Respondents.*

DORNIER, A. G., and DORNIER, GMBH, *Petitioners,*

v.

BUSH AIR, INC., an Alaska corporation, BUTLER AVIATION COMPANY, HAMILTON AVIATION COMPANY, HOME OIL COMPANY, FIELD AVIATION COMPANY, LIMITED, CLIFFORD L. SHORT, RAY E. FERGUSON, FRANK P. FERGUSON, DON FERGUSON, JOE FERGUSON, DON'S SAFARI FLYING SERVICE, FERGUSON'S FLYING SERVICE, KOTZEBUE FLYING SERVICE, INC., ALASKA CENTRAL AIRWAYS, INC., GEORGE GRANT, and AIRPARTS, INC., *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALASKA

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QUESTIONS PRESENTED

Did the courts of the State of Alaska violate due process in asserting personal jurisdiction over an alien defendant who lacks the required minimum contacts with the State of Alaska?

Did the courts of the State of Alaska incorrectly apply the stream of commerce theory of jurisdiction in violation of this Court's mandate in *World-Wide Volkswagen Corporation* v. *Woodsen*, 444 U.S. 286 (1980)?

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALASKA

Petitioners, Dornier, GmbH, and Dornier, A.G., respectfully request that a writ of certiorari issue to review the order of the Supreme Court of the State of Alaska dated March 24, 1981 (Appendix A), denying Dornier's Petition for Review of a decision by the Superior Court of the State of Alaska, Fourth Judicial District at Bethel, based on the Alaska long-arm statute which extends jurisdiction over nonresidents.

OPINIONS BELOW

The relevant opinions are unreported, and are attached as appendices as follows:

APPENDIX A — Supreme Court of Alaska, Order, dated March 24, 1981, in *Dornier, A.G.*, and *Dornier, GmbH, Petitioners,* v. *Donald E. Elliot, et al., Respondents.*

APPENDIX B — Superior Court of Alaska, Fourth Judicial District, Memorandum Decision, dated January 14, 1981, in *Donald E. Elliott, et al., Plaintiff,* v. *Dornier, GmbH, et al., Defendants*; *Avonna L. Sweaney, Plaintiff,* v. *Dornier, A.G., Dornier, GmbH, et al., Defendants*; *Bush Air, Inc., Plaintiff,* v. *Dornier, A.G., Dornier, GmbH, et al., Defendants*, consolidated actions for purposes of Dornier's Motion to Dismiss for Lack of Personal Jurisdiction.

APPENDIX C — Superior Court of Alaska, Fourth Judicial District, Order Denying Reconsideration, dated January 28, 1981, in *Donald E. Elliott, et al., Plaintiff,* v. *Dornier, GmbH, et al., Defendants*; *Avonna L. Sweaney, Plaintiff,* v. *Dornier, A.G., Dornier, GmbH, et al., Defendants*; *Bush Air, Inc., Plaintiff,* v. *Dornier, A.G., Dornier, GmbH, et al., Defendants*, consolidated actions for purposes of Dornier's Motion to Dismiss for Lack of Personal Jurisdiction.

JURISDICTION

The order of the court below was entered on March 24, 1981, by the Supreme Court of Alaska, the highest court of the State of Alaska

The jurisdiction of this court is invoked pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The relevant provisions of the United States Constitution in this suit are Amendment XIV, §1, and Article 6, the Supremacy Clause. The relevant statutory provision in the Alaska Long-Arm Statute, As 09.05.015. These provisions are set forth in Appendix D.

This petition seeks review of an order of the Supreme Court of the State of Alaska dated March 24, 1981, denying Dornier's Petition for Review of a decision by the Superior Court of the State of Alaska, Fourth Judicial District at Bethel, based on Alaska's long-arm statute extending jurisdiction of that state's courts over nonresidents.

STATEMENT OF THE CASE

This litigation arises out of an air crash which occurred on April 2, 1978, near Bethel, Alaska. The aircraft involved was a Dornier Skyservant owned by Bush Air, Inc., which is also a party in the various actions hereto. Dornier, a defendant in all three actions, filed motions to dismiss for lack of personal jurisdiction in each of the three pending suits in Alaska, and those suits were subsequently consolidated for purposes of hearing Dornier's jurisdictional arguments.

Petitioner Dornier is a corporation incorporated in the Federal Republic of Germany with its principal offices in Friedrichshafen, West Germany. It has never conducted business within the State of Alaska, and has had no offices in Alaska, no property in Alaska, no agents in Alaska, no sales force in Alaska, and has had no sales revenue from Alaska. The presence in Alaska of

an airplane manufactured by Dornier is the chance of result of random resale of the aircraft and is not related to the marketing efforts of Dornier. The original sale of the subject aircraft was made f.o.b. Munich to Hamilton Aviation, a Canadian company which then delivered the aircraft to Home Oil for its commercial use in Canada, and not for purposes of resale. Payment was due and received from Hamilton in German deutschemarks at delivery in Munich. The aircraft was transported to Canada by a Danish ferry company, and during shipment the ownership and risk of loss of the aircraft was with the Canadian purchaser. After some five and one-half years of service, it was sold by Home Oil to another Canadian company, and was eventually acquired by Alaska Air Service, in Anchorage. Thereafter the subject Skyservant aircraft was sold to Bush Air operating out of Bethel, Alaska.

Dornier has never sold an aircraft in the State of Alaska, nor has it ever sold an aircraft in the Federal Republic of Germany for delivery to a purchaser in the State of Alaska. Dornier's records reflect that only three Skyservant aircraft have ever been in the service of owners and operators in the State of Alaska. All three of those aircraft were originally sold to purchasers in locations other than the State of Alaska and were for a number of years in service, owned and operated by corporations and firms in locations outside of the State of Alaska. The Skyservant aircraft which is the subject of this lawsuit was for a number of years owned, based, and operated in Canada. Of the other two Skyservant aircraft which eventually reached Alaska, one was owned, based, and operated in Caracas, Venezuela for several years, and the other owned, based, and operated in the Republic of Panama and French West Indies for

several years. The later conveyances and transactions were performed without the knowledge or consent of Dornier, and in no way have any connection with Dornier's efforts to market its own aircraft.

Dornier has furnished repair and replacement parts to Munz Northern Airlines in Alaska upon request by the purchaser. The order for those replacement parts were sent by international mail to Dornier in the Federal Republic of Germany. Dornier selected the parts for shipment to the destination specified by Munz Northern Airlines, and adhered to its policy that purchase orders outside of the Federal Republic of Germany are sold f.o.b. Munich at quoted prices on the date of delivery for shipment, with packing and transportation costs paid by the purchaser. Dornier has never had or maintained a sales office in the State of Alaska, nor has it ever had or maintained a service, repair, or parts supply facility, depot or warehouse for aircraft parts in the State of Alaska. Neither has Dornier ever authorized or directed any of its sales personnel or factory representatives to make sales calls or conduct business or travel in the State of Alaska. Dornier has not made or carried out any direct solicitation for the sale of aircraft or aircraft parts in the State of Alaska. Dornier has no manufacturing plants or facilities which it owns or operates at any location in the United States and has never owned or operated any manufacturing plants or facilities in the United States. It has never owned or operated any sales, service, or repair station or facility for its products at any location in the United States.

The Skyservant aircraft involved in this suit have not been manufactured in mass quantities which have flooded the markets of the world, nor are Dornier air-

craft available through a distributor in the State of Alaska. Only a total of 228 Skyservant aircraft have ever been manufactured and sold, and of those 121 were sold and delivered to the government of the Federal Republic of Germany. Thus there is a total of but 107 such aircraft which have ever been sold commercially.

Plaintiffs' complaints allege that the subject aircraft crash occurred near Bethel, Alaska, on April 2, 1978, and that the subject aircraft involved was designed, manufactured, and assembled by Dornier. On that basis, plaintiffs have filed complaints in the Superior Court of the State of Alaska, Fourth Judicial District at Bethel,[1] seeking damages from Dornier on bases which include negligence, warranty, and strict liability.

Petitioner Dornier initially moved for dismissal in the Elliot case on June 2, 1980, and subsequently filed motions for dismissal in the Sweaney and Bush Air cases on July 11, 1980. The motions were based upon Dornier's contentions that it was not subject to personal jurisdiction in Alaska, and that plaintiffs had failed to make adequate service of process. After briefing and oral argument, the Superior Court for the State of Alaska, Fourth Judicial District, denied Dornier's motion to dismiss on jurisdictional grounds, and held that Dornier had sufficient minimum contacts with the State

[1] Bethel is a small, remote native community on the banks of the Kuskokwim river in western Alaska, not accessable by road.

of Alaska to satisfy the due process requirements of the Fourteenth Amendment and to permit an Alaska court to acquire personal jurisdiction over Dornier via the Alaska long-arm statute.

In reaching its conclusion, the Superior Court found that at the time of the crash Dornier had a distributor for the Western United States whose territory included Alaska. Materials filed by Dornier clearly establish that the referenced distributorship agreement was never effectively implemented nor put into operation. The agreement involved was with Land/Air Sales & Leasing, Inc., a California concern, but the contract did not go into force because Land/Air failed to comply with the requirements that they purchase parts and stock-in-trade. There is no showing that Land/Air ever sent personnel into Alaska, and the agreement was cancelled by Dornier within a few months of its inception because Land/Air's failure to comply. Consequently, Dornier moved for reconsideration of its motion to dismiss alleging that the Superior Court misconstrued the status of Dornier's distributorship agreement with Land/Air Sales & Leasing, Inc., The Superior Court, however, denied Dornier's motion for reconsideration concluding, on January 28, 1981, that the subject point had been raised and considered, and was not misunderstood by the court.

On February 9, 1981, Dornier filed a petition for review with the Supreme Court of the State of Alaska, seeking reversal of the denial of its motion to dismiss for lack of jurisdiction by the Superior Court. In so doing, Dornier explicitly referenced the constitutional violations inherent in the decision of the Superior court, and ex-

pressly pointed out the inconsistency of the decision with this Court's opinion in *World-Wide Volkswagen* v. *Woodsen*. Nonetheless, the Supreme Court for the State of Alaska denied without opinion Dornier's petition for review.[2]

Dornier brings this appeal from the decision that jurisdiction can be asserted over it consistent with the due process clause of the Fourteenth Amendment to the United States Constitution.

REASONS FOR GRANTING THE WRIT

I. The Decision Of The Court Below Violated The Petitioner's Right To Due Process Of Law In That It Permitted An Assertion Of Jurisdiction Despite The Lack Of Minimum Contacts By The Defendant With The State Of Alaska.

Dornier's petition for review should be granted as a means of relieving the undue hardship and burden imposed by the decision of the courts below. The erroneous decision requires Dornier to defend an action in a forum

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[2] It should be note that there is presently pending before the Supreme Court of Alaska a second petition for review relating to the Superior Court's refusal to require discovery against Dornier to proceed in accordance with the Hague Convention of 1970 relating to the Taking of Evidence Abroad, 23 UST 2557, TIAS 7444. That treaty became effective in the United States in 1972, and is applicable in Alaska via the Supremacy Clause of the United States Constitution, Article 6 (See Appendix D). The refusal of the Alaska Court to abide by its provisions further demonstrates the prejudice to Dornier from suit in Alaska, and the need for review of the jurisdictional question.

The pending petition for review also seeks to establish that service of process over Dornier was ineffective and points out that the laws of the Federal Republic of Germany require that suits against Dornier be brought in the German court of Landgericht-Ravensburg.

far from its home, and in particular, in a forum which, based on its marketing policies, it had no reason to foresee as a situs for litigation. The expense and hardship involved in defending in Alaska are particularly significant, as inquiry into the design and manufacture of the subject aircraft will require an examination of numerous documents written in the German language and witnesses located in the Federal Republic of Germany. The subject litigation in fraught with practical problems which would plague the defense of Dornier, and which render it difficult if not impossible for Dornier to adequately defend itself in that forum.

This injustice perpetrated on Dornier is a direct violation of the due process clause of the Fourteenth Amendment to the United States Constitution, as that clause has been interpreted to require that an assertion of jurisdiction can only be made where the minimum contacts with the forum state exist. The constitutional provision stands as an important legal right of litigants throughout the United States, and the impairment of that legal right by assertion of jurisdiction in Alaska works a substantial hardship which would not exist but for the decision below. Immediate review of that decision is required in order to reaffirm the viability of those constitutional principles, and to prevent the hardship and injustice that will befall Dornier should it be required to wait until the end of the litigation in order to establish its jurisdictional arguments.

It has long been recognized that the due process clause of the Fourteenth Amendment prevents a state from acquiring jurisdiction over the person of a nonresident defendant merely by service of process upon that defedant outside of the state. A state cannot render a judgment against a nonresident in the absence of per-

sonal jurisdiction. *Schaffer* v. *Heitner*, 433 U.S. 186 (1977). Thus a state may assert long-arm jurisdiction over a nonresident defendant only if there are sufficient minimum contacts with the state "so that maintenance of the suit does not offend the traditional notions of fair play and substantial justice." *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945).

However minimal the burden of defending in a foreign court, a defendant may not be called upon to do so unless he has the requisite minimum contacts. *Hanson* v. *Denckla*, 357 U.S. 235 (1958); *Schaffer* v. *Heitner*, *supra*. *In order to establish those minimum contacts, the defendant must have done some act by which he purposefully availed himself of the privilege of conducting activities within the forum state*, thus invoking the benefits and protections of the laws of that state. *Hanson* v. *Denckla*, *supra*.

In view of the foregoing we may observe that Dornier has not transacted business within the State of Alaska. Dornier owns no property within the State of Alaska, and has no salesmen or agents within the state. The sale of the subject aircraft was consumated outside of the United States, and delivery of the product was completed outside the United States. With regard to the aircraft involved in the subject crash, Dornier had no control over subsequent random resale of the product. The presence of the subject aircraft within the State of Alaska is the chance result of a series of unrelated events and has no relation whatever to Dornier's marketing of its aircraft.

Due process analysis also involves a consideration of the overall reasonableness of subjecting a nonresident defendant to jurisdiction in a particular forum. *Amba Marketing Systems, Inc.* v. *Jobar International*, 551 F.2d

784 (9th Cir. 1977); *L. B. Reeder Contractors of Arizona* v. *Higgins Industries*, 265 F.2d 768 (9th Cir. 1959). The Ninth Circuit has enunciated the process by which jurisdictional due process questions are analyzed, 551 F.2d 784 at 789:

> Federal law is controlling on the issue of due process. It is essentially a question of whether Jobar has sufficient "minimum contacts" with Arizona such that invoking jurisdiction there would be consistent with the notions of "fair play and substantial justice." [*International Shoe, supra.*] Although under this flexible standard a case by case determination necessarily must be made, this court has adopted a basic three step analysis in making such determinations. First, the nonresident defendant must do some act or consumate some transaction within the forum, however indirect it may be. Second, the claim must be one which arises out of, or results from the defendant's activities within the forum, even if the actual claim comes to fruition in another state. Finally, the overall reasonableness of subjecting the defendant to jurisdiction of the forum's court must be considered.

The three step approach in *Amba Marketing Systems, supra*, was also applied to *Data Disc, Inc.* v. *Systems Technology Associates, Inc.*, 557 F.2d 1280 (9th Cir. 1977). A nonresident defendant was there held amenable to California jurisdiction despite the absence of substantial contacts with California. Though the defendant's contacts were not sufficiently pervasive to subject it to general jurisdiction, its participation in contract negotiations in California were sufficient to subject it to jurisdiction with regard to claims arising from that contract. Similarly, misrepresentations induced reliance

in California, thereby allowing jurisdiction over the tort claims too. Having reached this point in the analysis, the court then stated at 1288:

> We must still determine, however, whether the exercise of jurisdiction over the tort claim would be reasonable. . . . It may be unreasonable to subject an out-of-state defendant to jurisdiction where the allegedly torious act is committed outside of the forum state, having only an effect within the state, if the act is negligent rather than purposeful. *The degree to which the defendant interjects himself into the state affects the fairness of subjecting him to jurisdiction.* . . . [Emphasis added.]

The foregoing must be considered in light of a recent controlling decision by this Court, *World-Wide Volkswagen Corp.* v. *Charles S. Woodsen*, 444 U.S. 286 (1980). In that case the courts of the State of Oklahoma had asserted jurisdiction over defendants World-Wide Volkswagen Corporation and Seaway Volkswagen, Inc., despite the absence of any showing that any automobile other than the subject one in the accident had ever entered the State of Oklahoma. The Court reviewed its earlier decisions and dismissed any suggestion that all restrictions on personal jurisdiction had been removed. It stated, at 565:

> The due process clause does not contemplate that a state may make a binding judgment in personam against an individual or corporate defendant with which the state has no contacts, ties, or relations. . . . *Even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another state; even if the forum state has a strong interest in applying its law to the controversy; even if the forum state is the most convenient location for litigation, the due process clause, acting as an instrument of interstate*

> *federalism, may sometimes act to divest the state of its power to render a valid judgment.* [Emphasis added.]

The plaintiffs had argued that it was "foreseeable" that an automobile, by its very nature, could cause injury in Oklahoma. The Court rejected that argument and stated at page 566:

> Yet "foreseeability" alone has never been a sufficient benchmark for personal jurisdiction under the due process clause. . . .
>
> This is not to say, of course, that foreseeability is wholly irrelevant. *But the foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum state.* Rather, it is that the defendant's conduct in connection with the forum state is such that he should reasonably anticipate being held into court there. . . . [Emphasis added.]

The law of *World-Wide Volkswagen* should have been determinative of the issue in this case. There were no sales of the subject aircraft in the State of Alaska, and it was not foreseeable that any of the aircraft would ever be sold in the State of Alaska in view of the petitioner's marketing policies. While it may be foreseeable that an aircraft may be flown anywhere in the world, it is not reasonable or fair for defendant Dornier to defend anywhere in the world that "unilateral activities" of others may place its aircraft. Dornier has had no contact with the State of Alaska, and its conduct did not render it foreseeable that these particular aircraft would reach the State of Alaska. The question involved here is not one of where the most convenient forum for litigation would be, but rather one relating to the power of the state to subject an alien corporation to jurisdiction merely because the plaintiffs find it convenient to do so.

Proceeding with the litigation below without first considering Dornier's position regarding personal jurisdiction would subject petitioner to an expensive and burdensome litigation that may ultimately be rendered unnecessary. Only by granting this petition for review and considering now the erroneous decision of the courts below, will Dornier be relieved of this burden and will its legal rights be recognized.

II. The Courts Of The State Of Alaska Improperly Applied The Stream Of Commerce Theory Of Jurisdiction In Violation Of This Court's Recent Decision In World-Wide Volkswagen Corporation v. Woodsen, 444 U.S. 286 (1980).

Dornier was held to jurisdiction in Alaska because, in the words of the Superior Court:

> . . .the Skyservant aircraft, manufactured in Germany by a German firm, was voluntarily placed into the worldwide stream of commerce without restriction by Dornier. Although the manufacturer did not sell the aircraft to an Alaska operator, it was foreseeable to the manufacturer that the aircraft would be operated in Alaska and could be involved in personal injury or property damage situations in the state. . . .

The foregoing is an improper application of the stream of commerce theory of jurisdiction, and its conclusion effectively eliminates all restrictions on jurisdictional assertions against manufacturers. Under that decision any manufacturer that learns that one of its products has reached a particular forum, irrespective of the means by which the product reached that destination, is subject to suit in that forum. Such a rule exceeds that state's powers as the constitutionally required minimum contacts are not present.

While AS 09.05.015(a)(4)(B) speaks of "long-arm" jurisdiction over nonresident defendants where a product has been used in the State of Alaska, this Court has held that constitutional due process requires more than mere use of a product within a state. In *World-Wide Volkswagen* v. *Woodsen, supra*, the Court stated at page 567:

> The forum state does not exceed its powers under the due process clause if its asserts personal jurisdiction over a corporation that delivers its product into the stream of commerce with the expectation that they will be *purchased* by customers in the forum state. [Emphasis added.]

No Skyservant aircraft has ever been sold in Alaska other than through random resale, and Dornier has no sales organization marketing its aircraft within the State of Alaska

That it is *marketing* activity of the manufacturer that is important to jurisdictional criteria, rather than the random activities of subsequent purchasers, was further established by this Court when it stated, in the *World-Wide* decision at 567:

> It is foreseeable that purchaser of automobiles sold by World-Wide and Seaway may take them to Oklahoma. *But the mere unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum state.* [Emphasis added.]

The jurisdictional point emphasized in *World-Wide Volkswagen* v. *Woodsen, supra*, is that foreseeability is a critical factor in any stream of commerce jurisdictional assertion. The foreseeability required is more than a mere speculative possibility must have actual knowledge, or good reason to know, that is conduct will have effect

in the forum state. *Leasco Date Processing Equipment Corp.* v. *Maxwell*, 468 F.2d 1326, 1341 (2d Cir. 1972). This Court stated in *World-Wide*, at 567:

> The foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum state. Rather, *it is that the defendant's conduct in connection with the forum state is such that he should reasonably anticipate being held into court there. . . .* [Emphasis added.]

There were no sales of the subject aircraft in the State of Alaska, nor in the United States, and consequently there was no reason for Dornier to foresee that any Skyservant aircraft would ever be sold within the State of Alaska. Dornier had no render it foreseeable that these particular aircraft would reach the State of Alaska.

Opponents of Dornier's efforts to obtain dismissal for lack of personal jurisdiction relied heavily upon the presence in Alaska of three Skyservant aircraft manufactured by Dornier. They conceded, however, that none of those aircraft were sold by Dornier to entities within the State of Alaska, and indeed, it was established that all three of the aircraft which did reach the State of Alaska were initially sold by Dornier to purchasers *outside of the United States*. Dornier had no involvement in the subsequent resales of the aircraft manufactured by it, and the fact that Dornier subsequently acquired knowledge to the effect that these three aircraft were operating in the State of Alaska is not a contact by Dornier with the State of Alaska.

Dornier had supplied replacement parts for two aircraft operating in Alaska pursuant to orders from Munz Northern Airlines forwarded via international mail to Dornier in the Federal Republic of Germany. Dornier's

policy, as utilized with regard to these transactions, was that purchases of repair or replacement parts were made "ex works", with packing and transportation costs paid by the purchaser. This is the equivalent of a sale f.o.b., which clearly demonstrates that the focus of the transaction was at the factory in West Germany. If anything, those transactions reflected contacts by Munz Northern Airlines with the Federal Republic of Germany rather than a contact by Dornier with the State of Alaska. Those sales of replacement parts were performed at the request of the purchaser, and not upon the solicitation of sale by Dornier.

Uncontradicted affidavits submitted by Dornier in connection with its motion to dismiss, and its petition for review, clearly established that though Dornier did enter into a distributorship agreement with Land/Air Sales & Leasing, Inc. of Chino, California, the distributorship arrangement never became effective because of the failure of the distributor to comply with the basic requirements of the agreement. The distributorship agreement was ineffective from its inception, and there was no sales activity under it in Alaska or anywhere else.

It follows that Dornier's marketing policy did not make it foreseeable that it might be held into suit in Alaska, and consequently the subjection of Dornier to jurisdiction in the State of Alaska is contrary to this Court's decision in *World-Wide Volkswagen* v. *Woodsen*. This Court must act and reverse the decision below to preserve the basic constitutional rights involved and to avoid erosion of the fundamental principles set forth by this Court in *World-Wide Volkswagen* v. *Woodsen*.

CONCLUSION

This case presents to the Court an opportunity to clearly articulate that stream of commerce jurisdiction applies only with regard to the marketing activities of the nonresident defendant. Misuse of the long-arm statutes where the product of a nonresident manufacturer has reached the forum state other than through its marketing activities can result in extreme unfairness and prejudice to a nonresident defendant, the burden of which is only magnified in the case of an alien defendant. The expense and hardship imposed upon defendant Dornier in this case require correction by this Court, and the refusal of the courts below to apply the law regarding jurisdiction as expressed in the opinion of *World-Wide Volkswagen* v. *Woodsen* similarly mandates immediate review.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF ALASKA

Supreme Court No. 5787

DORNIER, A.G.., and DORNIER, GMBH, *Petitioners*

v.

DONALD E. ELLIOTT, *et al., Respondents.*

Superior Court No.
4BE 79-140 Civil
4BE 80-57 Civil
4BE 80-59 Civil

Before: Rabinowitz, *Chief Justice,* Connor, Burke, Matthews and Compton, *Justices.*

Order

On consideration of the petition for reveiw filed February 17, 1981, and the responses filed on February 19 and February 23, 1981,

IT IS ORDERED:

The petition for review is denied.

Entered by direction of the court at Anchorage, Alaska on March 24, 1981.

CLERK OF THE
SUPREME COURT

/s/ ROBERT D. BACON
ROBERT D. BACON

APPENDIX B

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FOURTH JUDICIAL DISTRICT
AT BETHEL

No. 4BE-79-140 Civil

DONALD E. ELLIOTT and EVELYN L. ELLIOTT, individually and as Personal Representatives of the Estate of SCOTT V. ELLIOTT, Deceased, *Plaintiff,*

v.

DORNIER GMBH, a German corporation, BUSH AIR, INC., an Alaska corporation, and WIEN AIR ALASKA, INC., an Alaska corporation, *Defendants.*

No. 4BE-80-59 Civil

AVONNA L. SWEANEY, Personal Representative of the Estate of GARY B. ROBERTS, *Plaintiff,*

v.

DORNIER, A.G., DORNIER GMBH, BUTLER AVIATION COMPANY, HAMILTON AVIATION COMPANY, HOME OIL COMPANY, LIMITED, FIELD AVIATION COMPANY, LIMITED, CLIFFORD L. SHORT, RAY E. FERGUSON, FRANK P. FERGUSON, DON FERGUSON, JOE FERGUSON, DON'S SAFAIR FLYING SERVICE, KOTZEBUE FLYING SERVICE, INC., ALASKA CENTRAL AIRWAYS, INC., GEORGE GRANT, and AIRPARTS, INC. *Defendants.*

No. 4BE-80-57 Civil

BUSH AIR, INC., an Alaska corporation, *Plaintiff*,

v.

DORNIER, A.G., DORNIER GMBH, BUTLER AVIATION COMPANY, HAMILTON AVIATION COMPANY, HOME OIL COMPANY, LIMITED, FIELD AVIATION COMPANY, LIMITED, CLIFFORD L. SHORT, RAY E. FERGUSON, FRANK P. FERGUSON, DON FERGUSON, JOE FERGUSON, DON'S SAFAIR FLYING SERVICE, FERGUSON'S FLYING SERVICE, KOTZEBUE FLYING SERVICE, INC., ALASKA CENTRAL AIRWAYS, INC., GEORGE GRANT, and AIRPARTS, INC., *Defendants*.

Memorandum Decision

These cases have been joined for consideration of defendant Dornier's motion to dismiss for lack of personal jurisdiction.[1]

The litigation concerns the fatal crash of a Skyservant aircraft near Bethel, Alaska, on April 2, 1978. The aircraft was manufactured by Dornier in the Federal Republic of Germany. According to Dornier, the firm has never conducted business within the State of Alaska, it has no offices, property, agents, or sales force in Alaska and has had no sales revenues from Alaska.

The aircraft involved in this case was sold in Germany to a Canadian company which in turn delivered it to Home Oil Company of Calgary. After several years' service in Canada the plane was acquired by an Anchorage firm and was operated in Alaska from 1974 until the crash. Plaintiffs and co-defendants opposing the motion assert that personal jurisdiction over Dornier, a foreign defendant whose products

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[1] The parties have stipulated to submission of this aspect of the motion to dismiss without reference to the sufficiency of process issues.

allegedly caused injury to persons or property within Alaska, is conferred by A.S. 09.05.015, Alaska's "long-arm" statute.

Alaska's "longarm" statute has been construed by our Supreme Court to extend jurisdiction to the maximum reach consistent with due process under the Fourteenth Amendment. *Jonz* v. *Garrett/Airsearch Corp.*, 490 P.2d 1197 (Alaska 1971). Such due process standards are met when sufficient minimum contacts with the state exist "so that maintenance of the suit does not offend traditional notions of fair play and substantial justice". *International Shoe* v. *Washington*, 326 U.S. 310, 90 L.Ed. 95 (1945). The "minimum contact" requirement is satisfied in all forums where it is forseeable to the manufacturer that the product may be marketed when a manufacturer voluntarily places its product in the general stream of commerce without restriction. *Commodities World Inter'l Corp.* v. *Royal Mile, Inc.*, 440 F.Supp. 1373, 1378-79 (D.C. Puerto Rico 1977); *Gray* v. *American Radiator and Standard Sanitary Corp.* 22 Ill.2d 432, 176 N.E.2d 761 (1961): *Modern Trailer Sales, Inc.* v. *Traweek*, 561 P.2d 1192 (Alaska 1971). The stream of commerce doctrine also applies to manufacturers of component parts and manufacturers whose products are distributed by independent intermediaries. *Stephenson* v. *Duriron Co.*, 401 P.2d 423 (Alaska 1965), *cert. denied* 382 U.S. 956, 15 L.Ed.2d 360 (1965); *Volkswagenwerk, A.G.* v. *Klippan, GmbH*, 611 P.2d 498 (Alaska 1980).[2]

The opponents of the motion assert that Dornier manfactured 228 Skyservant aircraft for sale and operation generally throughout the world. To Dornier's knowledge, three Skyservant aircraft have been owned and operated in Alaska and, as to two aircraft operated by Munz Northern Airlines of Nome, Dornier has filled orders from Alaska for

[2] World Wide *Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 62 L.Ed. 2d 490 (1980), relied on by Dornier is distinguishible from this litigation for substantially the same reasons as *Klippan*, 611 P.2d at 501 n.6.

repair or replacement parts. Dornier also has provided copies of technical data and flight manual updates to operators of its aircraft in Alaska and at the time of the crash had a distributor for the western United States whose territory included Alaska.

Dornier has sought and obtained certification for the aircraft from the United States Federal Aviation Administration and its products have been advertised in publications which circulate throughout the national aviation community. Published information about the Skyservant indicates that it is used worldwide in more than 30 countries and that its STOL characteristics are suitable for short, unprepared landing strips and Arctic conditions, which are common in much of Alaska.[1] The three Skyservant aircraft known to Dornier to have been operated in Alaska were previously operated in Canada and Central and South America.

Based on the foregoing, the Court finds that the Skyservant aircraft, manufactured in Germany by a German firm, was voluntarily placed into the worldwide stream of commerce without restriction by Dornier. Although the manufacturer did not sell the aircraft to an Alaska operator, it was forseeable to the manufacturer that the aircraft would be operated in Alaska and could be involved in personal injury or property damage situations in this state. This likelihood is more than mere conjecture since for several years prior to the fatal crash Dornier knew its aircraft were operating in Alaska, it sold replacement parts to an Alaska customer and it had a distributor whose territory included Alaska.

These circumstances, coupled with the substantial factor that a fatal crash of an aircraft manufactured by Dornier occurred in Alaska allegedly causing personal injury wrongful death, damage and property loss to three Alaskan plaintiffs,

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[1] Affidavit of Phyllis C. Johnson.

constitute sufficient "mininum contacts" with the state of Alaska to satisfy the due process requirements of the Fourteenth Amendment and to permit an Alaskan court to acquire personal jurisdiction over Dornier via Alaska's "long-arm" statute, A.S. 09.05.015. Therefore, Dornier's motion to dismiss for lack of personal jurisdiction will be denied.

IT IS SO ORDERED.

DATED at Bethel, Alaska this 14th day of January, 1981.

(SEAL)

/s/ CHRISTOPHER R. COOKE
Christopher R. Cooke
Superior Court Judge

cc: files
attys

APPENDIX C

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FOURTH JUDICIAL DISTRICT
AT BETHEL

No. 4BE-79-140 Civil

DONALD E. ELLIOTT and EVELYN L. ELLIOTT, individually and as Personal Representatives of the Estate of SCOTT V. ELLIOTT, DECEASED, *Plaintiff,*

v.

DORNIER GMBH, a German corporation, BUSH AIR, INC., an Alaska corporation, and WIEN AIR ALASKA, INC., an Alaska corporation, *Defendants,*

No. 4BE-80-59 Civil

AVONNA L. SWEANEY, Personal Representative of the Estate of GARY B. ROBERTS, *Plaintiff,*

v.

DORNIER, A.G., DORNIER GMBH, BUTLER AVIATION COMPANY, HAMILTON AVIATION COMPANY, HOME OIL COMPANY, LIMITED, FIELD AVIATION COMPANY, LIMITED, CLIFFORD L. SHORT, RAY E. FERGUSON, FRANK P. FERGUSON, DON FERGUSON, JOE FERGUSON, DON'S SAFAIR FLYING SERVICE, KOTZEBUE FLYING SERVICE, INC., ALASKA CENTRAL AIRWAYS, INC., GEORGE GRANT, and AIRPARTS, INC. *Defendants.*

No. 4BE-80-57 Civil

BUSH AIR, INC., an Alaska corporation, *Plaintiff,*

v.

DORNIER, A.G., DORNIER GMBH, BUTLER AVIATION COMPANY, HAMILTON AVIATION COMPANY, HOME OIL COMPANY, LIMITED, FIELD AVIATION COMPANY, LIMITED, CLIFFORD L. SHORT, RAY E. FERGUSON, FRANK P. FERGUSON, DON FERGUSON, JOE FERGUSON, DON'S SAFAIR FLYING SERVICE, FERGUSON'S FLYING SERVICE, KOTZEBUE FLYING SERVICE, INC., ALASKA CENTRAL AIRWAYS, INC., GEORGE GRANT, and AIRPARTS, INC., *Defendants.*

Order Denying Reconsideration

Defendant Dornier's motion for reconsideration states that the Court misconstrued the status of Dornier's distributorship agreement with Land/Air Sales and Leasing, Inc. This point was raised and considered during argument on the motion to dismiss and was not misunderstood by the Court. The significance of the distributorship agreement pertains not to whether it was "effectively implemented" or was "operative" at the time of the crash but to the forseeability of Alaska, part of the distributor's sales territory, as a forum for litigation involving Dornier's products.

The motion to reconsider this Court's decision of January 14, 1981, is without merit and is, therefore, denied.

IT IS SO ORDERED.

DATED at Bethel, Alaska this 28th day of January, 1981.

(SEAL) /s/ CHRISTOPHER R. COOKE
Christopher R. Cooke
Superior Court Judge

APPENDIX D

Constitutional Provisions

Fourteenth Amendment To United States Constitution

Section 1. . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

Article 6 Of United States Constitution

This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.

Statutes

AS 09.05.015

(a) A court of this state having jurisdiction over the subject matter has jurisdiction over a person served in an action according to the rules of civil procedure. . . .

(4) in an action claiming injury to person or property in this state arising out of an act or omission out of this state by the defendant, provided, in addition, that at the time of the injury either,

(A) solicitation or service activities were carried on in this state by or on behalf of the defendant; or

(B) product, materials or things processed, serviced or manufactured by the defendant were used or consumed in this state in the ordinary course of trade;

QUESTIONS PRESENTED

1) Has the Alaska Supreme Court entered a final judgment or decree on the issue of whether the Alaska courts have personal jurisdiction over petitioner Dornier?

2) Have the Alaska courts correctly applied the United States Supreme Court's Opinion in *World-Wide Volkswagen v. Woodsen*, 444 U.S. 286 (1980)?

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IN THE

Supreme Court of the United States

October Term, 1981

DORNIER GMBH, a German Corporation, *Petitioner*

v.

DONALD E. ELLIOTT and EVELYN L. ELLIOTT, individually and as Personal Representatives of the ESTATE OF SCOTT ELLIOTT, DECEASED, BUSH AIR, INC., an Alaska corporation, and WIEN AIR ALASKA, INC., an Alaska corporation, *Respondents.*

DORNIER, A. G., and DORNIER, GMBH, *Petitioners,*

v.

AVONNA L. SWEANEY, Personal Representative of the ESTATE OF GARY B. ROBERTS, BUTLER AVIATION COMPANY, HOME OIL COMPANY, LIMITED, FIELD AVIATION COMPANY, LIMITED, CLIFFORD L. SHORT, RAY E. FERGUSON, FRANK P. FERGUSON, DON FERGUSON, JOE FERGUSON, DON'S SAFARI FLYING SERVICE, KOTZEBUE FLYING SERVICE, INC., ALASKA CENTRAL AIRWAYS, INC., GEORGE GRANT, and AIRPARTS, INC., *Respondents.*

DORNIER, A. G., and DORNIER, GMBH, *Petitioners,*

v.

BUSH AIR, INC., an Alaska corporation, BUTLER AVIATION COMPANY, HAMILTON AVIATION COMPANY, HOME OIL COMPANY, FIELD AVIATION COMPANY, LIMITED, CLIFFORD L. SHORT, RAY E. FERGUSON, FRANK P. FERGUSON, DON FERGUSON, JOE FERGUSON, DON'S SAFARI FLYING SERVICE, FERGUSON'S FLYING SERVICE, KOTZEBUE FLYING SERVICE, INC., ALASKA CENTRAL AIRWAYS, INC., GEORGE GRANT, and AIRPARTS, INC., *Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALASKA

BRIEF FOR RESPONDENT BUSH AIR, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JURISDICTION

Petitioner claims the jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3). However, because there has been no final judgment or decree by the Alaska Supreme Court, 28 U.S.C. §1257 does not apply and this Court does not have jurisdiction over this matter.

STATUTES AND RULES

28 U.S.C. §1257. State Courts; Appeal; Certiorari

Final judgments or decrees rendered by the highest court of State in which a decision could be had, may be reviewed by the Supreme Court as follows:

. . . .

(3)By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

United States Supreme Court Rules

Rule 17. CONSIDERATIONS GOVERNING REVIEW ON CERTIORARI

.1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another

state court of last resort or of a federal court of appeals.

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

.2. The same general considerations outlined above will control in respect of petitions for writs of certiorari to review judgments of the Court of Claims, of the Court of Customs and Patent Appeals, and of any other court whose judgments are reviewable by law on writ of certiorari.

Alaska Appellate Rules

RULE 402. Petitions for Review of Non-appealable Orders or Decisions

(a) When Available.

(1) An aggrieved party, including the state of Alaska, may petition the appellate court as provided in Rule 403 to review any order or decision of the trial court, not appealable under Rule 202, in any action or proceeding, civil or criminal.

. . . .

(b) When Granted. Review is not a matter of right, but will be granted only where the sound policy behind the rule requiring appeals to be taken only from that final judgments is outweighed because:

(1) Postponement of review until appeal may be taken from a final judgment will result in injustice because of impairment of a legal right, or because of unnecessary delay, expense, hardship or other related factors; or

(2) The order or decision involves an important question of law on which there is substantial ground for difference of opinion, and an immediate review of the order or

decision may materially advance the ultimate termination of the litigation, or may advance an important public interest which might be compromised if the petition is not granted; or

(3) The trial court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by an inferior court or administrative tribunal, as to call for the appellate court's power of supervision and review; or

(4) The issue is one which might otherwise evade review, and an immediate decision by the appellate court is needed for the guidance of the lower courts or is otherwise in the public interest.

STATEMENT OF THE CASE

On April 2, 1978, a Dornier aircraft owned and operated by respondent Bush Air, Inc. crashed near Bethel, Alaska, killing both men on board. As a result of this fatal aircrash, Bush Air and the families of the deceased each filed a lawsuit against petitioner Dornier and other defendants. These lawsuits were filed in the Alaska Superior Court, Fourth Judicial District, at Bethel, and all three were assigned to the Honorable Christopher R. Cooke, the Superior Court Judge in Bethel.[1] In each lawsuit, petitioner Dornier filed a motion to dismiss on the grounds of lack of personal jurisdiction, insufficient process, and insufficient service of process.

1. Petitioner describes Bethel as a "small, remote native community on the banks of the Kuskokwim river in western Alaska not accessable [sic] by road." In fact, Bethel is a town of approximately 4,000 people, and is serviced by two airlines which have flights to Bethel four times daily from Anchorage, a city of approximately 200,000. The airlines fly Boeing 737's and Convair 580's; the flight takes a little more than one hour. It should also be noted that, to Alaska residents, Germany is also not accessible by road.

The three lawsuits were consolidated for the purpose of the motions to dismiss, and by consent of the parties, the personal jurisdiction claim was decided separately from the process claims.

Dornier is a West German corporation which manufactures various types of aircraft in West Germany. In its arguments below, as in its petition for writ of certiorari, Dornier maintained that it had never conducted business in Alaska, had no sales revenue from Alaska and that the presence of Dornier aircraft in Alaska was a result of random resale and not Dornier's marketing efforts. Based upon these alleged facts, Dornier claimed that the Alaska court did not have personal jurisdiction over it and that plaintiff's claims could be litigated only in West Germany.

In opposing Dornier's motion in the Alaska Superior Court, respondents Bush Air and Sweaney established facts demonstrating that Dornier did have sufficient contacts with Alaska to be subject to personal jurisdiction pursuant to AS 09.05.015, Alaska's long-arm statute. A major contact, of course, was the fact that a Dornier Skyservant crashed in Alaska, killing two Alaska residents. The Dornier Skyservant owned by Bush Air was one of three Skyservants which Dornier acknowledged were in use in Alaska. The affidavit of Lester Risley, who had formerly owned and operated in Alaska the Dornier Skyservant which crashed, stated two additional Dornier aircraft had also been used in Alaska, including a new Skyservant brought to Alaska in 1971 by Butler Aviation, Dornier's United States distributor. Therefore, of the 107 Skyservants which Dornier states it sold to purchasers other than the German government, at least four were owned and operated in Alaska at various times.

The presence of these Dornier Skyservants in Alaska created a parts business for Dornier in Alaska. Risley's affidavit established that Dornier assigned him a factory representative to assist with service and parts problems; Dornier also sent him technical bulletins and flight manuals. Dornier's affidavits conceded that it sold parts to Munz Northern Airlines of Nome, Alaska, which owned and operated two Skyservants. Richard Galleher, owner of Munz, testified in his affidavit that, in the mid 1970's, he sent three purchase orders a year for approximately four years to Dornier; Dornier confirmed and filled all of those orders.

Other affidavits filed by respondents Bush Air and Sweaney established that Dornier had in fact pursued markets in the United States, including Alaska. Dornier applied for and obtained the FAA certification which would allow marketing and use of Dornier aircraft in the United States. In applying for this certification, Dornier stated that the aircraft was used in 35 countries around the world and emphasized characteristics of its planes that are particularly desireable in states such as Alaska. These claimed characteristics included: outstanding STOL (short take-off and landing) performance, simplified operation and maintenance, rugged design, ability to operate out of short, unprepared fields, convertibility to operate on wheels, skis, floats or amphibious gear, and independence from ground support. Dornier also advertised extensively in American aviation journals which are circulated in Alaska. Dornier's advertisements claimed many favorable characteristics for its planes, including their ability to fly in Arctic conditions. Alaska is the only state in which such an ability is necessary.

As stated above, Butler Aviation was Dornier's distributor in the United States. In addition, on January 17, 1978,

Dornier entered into a contract with Land-Air Sales and Leasing Inc. of Chino, California for Land-Air to become the exclusive distributor for Dornier in the western United States, in an area specifically including Alaska. On May 17, 1978, several weeks after the fatal accident at issue here, Dornier sent Land-Air written notice that Dornier was terminating the agreement with sixty days notice. The letter stated Land-Air had "the possibility to fulfill your obligations during the sixty (60) days period." The letter also reserved Dornier's right to damages for breach of contract.

As a result of the above facts and others established with admissible evidence filed by respondents, the Superior Court denied Dornier's motions to dismiss. The court found that Dornier voluntarily placed its Skyservant into the worldwide stream of commerce without restriction, that it knew its aircraft were operating in Alaska, that it had sold replacement parts to an Alaska customer, and that it had a distributor for Alaska. Added to the substantial factor of a fatal crash in Alaska, these factors constituted sufficient contacts to satisfy due process requirements and allow Alaska to acquire jurisdiction over Dornier.

Dornier moved for reconsideration of the court's decision, arguing that the court misconstrued the distributor situation. Dornier claimed that because it cancelled the distributorship agreement due to breaches, the agreement had in effect never existed and thus Dornier did not have the required minimum contacts to result in personal jurisdiction. The lower court denied the motion to reconsider, stating that even if the agreement had not been "effectively implemented," the existence of the agreement, and the inclusion of Alaska as part of the sales territory, was another factor establishing the foreseeability of Alaska as a forum for litigation involving Dornier aircraft.

Dornier next filed a Petition for Review with the Alaska Supreme Court. This petition asked for the court to exercise its discretion and review the lower court's opinion, pursuant to Alaska Appellate Rule 402. The Alaska Supreme Court declined to grant review. Ninety days after the Alaska court denied the petition, Dornier filed its petition for Writ of Certiorari, but failed to pay its docket fee for nearly three more weeks. Dornier did not comply with the United States Supreme Court Rule 19.3 requirement of notifying respondents of the date of filing and the docket number until July 22, 1981.

SUMMARY OF ARGUMENT

The Alaska Supreme Court denied Dornier's petition for discretionary review of the Superior Court's denial of Dornier's motions to dismiss. The Alaska Supreme Court's denial of the petition was not a final judgment or decree and was not a decision on the merits of the issue of personal jurisdiction. Therefore, jurisdiction of this Court under 28 U.S.C. §1257 has not been properly invoked, as review by this Court would be review of a non-final lower court decision rather than of a final decree by the highest court of the state.

Dornier cannot validly claim that the Alaska Supreme Court has misapplied this Court's opinion in *World-Wide Volkswagen v. Woodsen*, 444 U.S. 286 (1980), as the Alaska court has not issued a decision on the merits of the jurisdiction question in this case. In addition, the Alaska court's recent decision regarding personal jurisdiction in *Volkswagenwerk A.G. v. Klippan GmbH*, 611 P.2d 498 (Alaska 1980), *cert. den.*, 101 S. Ct. 385 (1980), demonstrates that the Alaska court has acknowledged and correctly inter-

preted the standards enunciated by this Court in *World-Wide Volkswagen*. Dornier is, in reality, seeking a review of the findings of fact made by the trial court, and its petition for a writ of certiorari should therefore be denied.

ARGUMENT

I. Petitioner Is Seeking Review Prematurely As There Is No Final Judgment by the Alaska Supreme Court In This Case

Petitioner Dornier alleges that its constitutional right to due process has been violated by the Alaska Superior Court's denial of Dornier's motion to dismiss the claims of respondents against Dornier. Petitioner's argument below was based upon the claim that it did not have sufficient contacts with Alaska to give the Alaska courts personal jurisdiction over it. Dornier claims to invoke the jurisdiction of this court pursuant to 28 U.S.C. §1257(3), which provides:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> . . . .
>
> (3) By writ of certiorari, . . . where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

Dornier's petition omits any discussion of the statutory requirement that the state court judgment or decree be final before the United States Supreme Court will review the decision. By filing its petition, Dornier appears to be assuming that every Alaska Supreme Court order is a final judgment or decree. However, the Superior Court's finding of personal jurisdiction has not yet been reviewed by the Alaska Supreme Court; appeal of the lower court's decision is still possible, and thus jurisdiction for review by this Court under 28 U.S.C. §1257 does not exist.

This Court has found that, to be reviewable, the state court decision must be "final" in two senses:

> [I]t must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not merely interlocutory or intermediate steps therein. It must be the final word of a final court. [Cites omitted]

Market St. Ry. v. Railroad Commission of State of California, 324 U.S. 548, 551 (1945). One major purpose of this finality requirement is to keep at a minimum federal intrusion into state affairs. *North Dakota State Board of Pharmacy v. Snyder's Drug Stores*, 414 U.S. 156 (1973); *Radio Station WOW Inc. v. Johnson*, 326 U.S. 120 (1945).

In recent years, this Court has broadened the definition of "finality," and defined situations in which a state court decision will be considered final for the purposes of 28 U.S.C. §1257 even though proceedings in the lower state courts have not been completed. *See e.g. Cox Broadcasting Corporation v. Cohen*, 420 U.S. 469 (1975); *Local No. 438 Construction and General Laborers' Union v. Curry*, 371 U.S. 542 (1963). However, the Court has not eliminated or weakened the requirement that the decision be final in the first sense, that is, that the decision be subject to no further review in the state courts.

The "final" judgment or decree of which Dornier seeks review is a March 24, 1981 order by the Alaska Supreme Court denying Dornier's petition for review of the Superior Court's denial of a motion to dismiss. Dornier's petition to the Alaska Supreme Court was made pursuant to Alaska Appellate Rule 402, which provides that a party may petition for the review of a non-appealable order. Such review is not a matter of right, and the petitioner must show that the

policy of appealing only from final judgments is outweighed by the circumstances of his case. Alaska Appellate Rule 402. The Alaska Supreme Court does not give reasons for denying interlocutory review, but it has specifically stated that:

> A denial of a petition for review of an interlocutory order does not mean that we either approve or disapprove of the order sought to be reviewed, but merely that we decline to pass judgment at all on the action of the court.

Contento v. Alaska State Housing Authority, 398 P.2d 1000 (Alaska 1965).

In a more recent Alaska case, the plaintiff contended that the lower court lost its power to vacate its own order after a petition for review was denied; the plaintiff argued that by declining to review the order, the Alaska Supreme Court had upheld its validity and caused it to become "the law of the case." The Alaska Supreme Court found:

> *A denial of a petition for review does not constitute a determination of the issue* in a case nor is it a final judgment for the purposes of *res judicata*. A petition will be denied where the issue is simply not important or urgent enough to warrant a departure from the usual appellate procedure. *The petitioner is not foreclosed by such denial in bringing up the issue later in an appeal, since there has been no determination of the merits of the issue.* [Emphasis added]

Wolff v. Arctic Bowl, Inc., 560 P.2d 758 (Alaska 1977).

These cases make it clear that there is no final judgment of which Dornier can seek review. All that has occurred to date is that the Superior Court has denied Dornier's motion to dismiss and the Alaska Supreme Court has declined to pass on the merits of that decision prior to the time for an appeal. Because the Alaska Supreme Court has not rendered a decision on the merits, the finality requirement of 28 U.S.C.

§1257 has not been met. Further, the conditions of United States Supreme Court Rule 17, outlining the considerations governing review on certiorari, have also not been met. Rule 17 provides that review may be granted if the highest state court has made a decision which conflicts with that of another state court, of a federal court of appeals, or of this Court. No such conflict can be claimed in this case both because the highest Alaska court has not yet made any decision and because previous Alaska Supreme Court decisions do correctly apply the minimum contacts standards enunciated by this Court [See Section II].

Granting certiorari in this case would have the effect of greatly lessening the discretion of the Alaska Supreme Court in deciding whether to grant interlocutory review of Superior Court decisions. Granting certiorari would signal to the Alaska court that it risks losing its opportunity to render a later decision if it denies a discretionary petition for review, as the petitioner could use that denial as a basis for petitioning this Court for a writ of certiorari. The Alaska court would thus be forced to grant many more petitions for review of interlocutory decisions in order to retain its jurisdiction to decide the questions at all.

Allowing recourse to the United States Supreme Court on this basis would also put an unduly powerful weapon into the hands of the wealthy defendants, by allowing the imposition of greatly increased time and expense merely to move beyond interlocutory lower court decisions and get to trial. Accordingly, this Court should find that no final judgment has been rendered by the Alaska Supreme Court and that this Court has no jurisdiction pursuant to 28 U.S.C. §1257.

II. The Alaska Courts Have Correctly Applied the Standards of This Court's Decision in World-Wide Volkswagen v. Woodsen, 444 U.S. 286 (1980)

Dornier's major argument in urging this Court to review the Alaska court's finding of personal jurisdiction is that *World-Wide Volkswagen v. Woodsen*, 444 U.S. 286 (1980) controls the question of whether personal jurisdiction exists, and that the Alaska court did not correctly apply the standards set in that case. Dornier claims both that it lacked the required minimum contacts with Alaska and that the lower court incorrectly applied the "stream of commerce" theory of jurisdiction. Dornier concludes that it was not foreseeable it would be required to defend itself in Alaska and that it would be unreasonable to force it to do so.

As discussed above, the Alaska Supreme Court has not reviewed the Superior Court's finding of personal jurisdiction; therefore, Dornier cannot validly argue that the Alaska Supreme Court has misapplied *World-Wide Volkswagen*. Further, petitioner raises no argument that the Alaska Supreme Court misapplied *World-Wide Volkswagen* when it recently decided *Volkswagenwerk, A.G. v. Klippan, GmbH*, 611 P.2d 498 (Alaska 1980), *cert. den.*, 101 S. Ct. 385 (1980), another Alaska case involving personal jurisdiction over a German corporation.

The fact situation in the instant case more closely resembles the situation in the Alaska case than that in *World-Wide Volkswagen*. In *World Wide Volkswagen*, which involved personal injuries suffered in an automobile accident, the Oklahoma court found jurisdiction over two New York corporations, one a wholesaler and one a retail dealer of Volkswagens. This Court granted certiorari to consider the state court jurisdiction issue and to resolve conflicts among

the decisions of the highest courts of five different states. The Court noted there was no evidence that either company did any business in Oklahoma, shipped any products there, had an agent in Oklahoma or purchased any advertisements calculated to reach Oklahoma. There was also no evidence that any other automobile sold by either company ever entered the state of Oklahoma. This Court concluded that neither one isolated occurrence nor foreseeability alone was a sufficient contact to create jurisdiction and that the defendants did not have the minimum contacts with Oklahoma necessary to be subject to jurisdiction in the state's courts.

In contrast, the defendant in *Volkswagenwerk, A.G. v. Klippan GmbH, supra,* as in the instant case, was a German manufacturer whose product caused injury in Alaska, rather than a wholesaler or retailer.[2] The Alaska court was fully aware of the *World-Wide Volkswagen* decision and demonstrated why that decision did not bar a finding of personal jurisdiction:

> The Supreme Court held that for Oklahoma to assert personal jurisdiction over the retail dealer and wholesaler would violate their due process rights, because both were New York corporations which had no business contacts with Oklahoma and which had not attempted in any way to market any cars in Oklahoma or otherwise derive benefit from Oklahoma's laws. To hold otherwise, stated the court, would mean "[e]very seller of chattels would in effect appoint the chattel

2. The *Volkswagenwerk* defendant, Klippan, was the manufacturer of seatbelts used in Volkswagens. Accordingly, the absolute number of items, but not the percentage of Klippan's product making its way to Alaska, exceeded the number of Dornier's planes in Alaska. However, the number of items should not be determinative of the personal jurisdiction question; if it were, the manufacturers of unsuccessful, expensive or specialized-use items would be better insulated from personal injury lawsuits than the manufacturers of higher quality, more successful or less expensive products, even though both groups purposefully availed themselves of the privilege of conducting activities in Alaska.

his agent for service of process." *Id.* This is *not* in conflict with the principle we assert here, though. Klippan, in contrast to the local distributors sued in the *World Wide case*, has deliberately designed and placed its product with a manufacturing and sales organization which it knew would market its product throughout the fifty states. The *World Wide* opinion explicitly recognizes this distinction:

> Hence if the sale of a product of a manufacturer or distributor such as Audi or Volkswagen is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its products in other states, it is not unreasonable to subject it to suit in one of those states if its allegedly defective merchandise has there been the source of injury to its owner or to others. The forum does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers it products into the stream of commerce with the expectation that they will be purchased by consumers in the forum state.

Id.

611 P.2d at 501-502 n.6 Petitioner makes no argument that Alaska court's reasoning in this opinion is in any way faulty, and the reasoning demonstrates the intervention of this Court is not necessary to guide or correct the Alaska Supreme Court in determining the personal jurisdiction issue.

In addition to *World-Wide Volkswagen*, Dornier's petition cites several other United States Supreme Court and Ninth Circuit cases regarding the manner of determining whether a defendant has sufficient minimum contacts with a state such that subjecting it to the jurisdiction of the state's courts would not violate the defendant's rights to due process; *e.g. Hanson v. Denkla*, 357 U.S. 235 (1958); *Amba Marketing Systems, Inc. v. Jobar International*, 551 F.2d 784 (9th Cir. 1977). In reality, however, Dornier is not

claiming that the Alaska court has applied the incorrect legal standard; instead, Dornier is seeking a redetermination, by this Court, of the facts found by the Superior Court.

The Alaska Superior Court found that Dornier had a distributor for Alaska, sent technical data and sold parts to Alaska residents, sought certification by the Federal Aviation Administration, advertised its products in the United States in magazines which circulated in Alaska, stressed characteristics which made its planes particularly suited to Alaska, and knew that its planes were operated in Alaska. Based upon these facts, plus the fact of fatal injury to Alaska residents, the court concluded that Dornier had sufficient contacts with Alaska to be subject to personal jurisdiction, and that it was foreseeable that Dornier would be sued in Alaska. In arguing that it did not have sufficient contacts, Dornier is now asking this Court to find that Dornier did not have an Alaskan distributor, that it earned no revenue in Alaska, that its marketing policy was not in any way aimed at selling planes in Alaska, and that its planes were in Alaska strictly by unforeseeable happenstance.

Respondent Bush Air contends that, based upon the evidence presented by all the parties, the Superior Court correctly found that Dornier had sufficient contacts with Alaska to be subject to personal jurisdiction in the Alaska courts and that such jurisdiction was both reasonable and foreseeable. However, even if the factual determinations were incorrect, this petition should not be granted. It is inappropriate to petition for a writ of certiorari simply to have this Court review evidence and decide questions of fact. *United States v. Johnston*, 268 U.S. 220 (1925); Wright, *Law of Federal Courts* 552 (3d.ed. 1976). Granting review in this case would serve no purpose other than to re-examine

and determine the facts of this particular case. This Court has very recently defined the limits of a state court's jurisdiction over non-resident defendants, and the instant case does not raise any new legal issues, nor does it involve any conflict between Alaska Supreme Court decisions and the decisions of any other appellate court. Finally, even if this issue is not eventually appealed to the Alaska Supreme Court, this Court's refusal to review the case would leave no incorrect Alaska Supreme Court precedent in place nor have a chilling effect upon any party or non-party's behavior. Accordingly, this Court should deny review of this case.

CONCLUSION

Dornier's petition is premature because the Alaska Supreme Court has not entered a final judgment on the issue of personal jurisdiction. It would further be inappropriate for this Court to review the finding that the Alaska courts have personal jurisdiction over Dornier because petitioner is merely seeking a re-examination of the Alaska Superior Court's finding of facts. Accordingly, Dornier's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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No. 81-34

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1981

DORNIER GMBH, a German Corporation, *Petitioner,*

v.

DONALD E. ELLIOTT and EVELYN L. ELLIOTT, individually and as Personal Representatives of the ESTATE OF SCOTT V. ELLIOTT, DECEASED, BUSH AIR, INC., an Alaska corporation, and WIEN AIR ALASKA, INC., an Alaska corporation, *Respondents.*

DORNIER, A. G., and DORNIER GMBH, *Petitioners,*

v.

AVONNA L. SWEANEY, Personal Representative of the ESTATE OF GARY B. ROBERTS, BUTLER AVIATION COMPANY, HOME OIL COMPANY, LIMITED, FIELD AVIATION COMPANY, LIMITED, CLIFFORD L. SHORT, RAY E. FERGUSON, FRANK P. FERGUSON, DON FERGUSON, JOE FERGUSON, DON'S SAFARI FLYING SERVICE, KOTZEBUE FLYING SERVICE, INC., ALASKA CENTRAL AIRWAYS, INC., GEORGE GRANT, and AIRPARTS, INC., *Respondents.*

DORNIER, A. G., and DORNIER, GMBH, *Petitioners,*

v.

BUSH AIR, INC., an Alaska corporation, BUTLER AVIATION COMPANY, HAMILTON AVIATION COMPANY, HOME OIL COMPANY, FIELD AVIATION COMPANY, LIMITED, CLIFFORD L. SHORT, RAY E. FERGUSON, FRANK P. FERGUSON, DON FERGUSON, JOE FERGUSON, DON'S SAFARI FLYING SERVICE, FERGUSON'S FLYING SERVICE, KOTZEBUE FLYING SERVICE, INC., ALASKA CENTRAL AIRWAYS, INC., GEORGE GRANT, and AIRPARTS, INC., *Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALASKA

BRIEF FOR RESPONDENT SWEANEY IN OPPOSITION

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QUESTIONS PRESENTED

Does this Court have jurisdiction to review the issue below when the highest court of the State of Alaska has rendered neither decision nor final judgment?

Is due process violated by the exercise of jurisdiction over a foreign manufacturer who sold replacement aircraft parts to Alaska customers, contacted and assisted Alaska owners of its aircraft, had a western United States distributor whose territory included Alaska, and extensively advertised its aircraft in Alaska as suitable for conditions prevalent in Alaska, where the crash of its aircraft gave rise to this litigation?

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ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALASKA

BRIEF FOR RESPONDENT SWEANEY IN OPPOSITION

OPINIONS BELOW

Respondent Sweaney adopts the description of the opinions below set forth at page 2 and in the Appendix of the Petition for Certiorari.

JURISDICTION

The order of the Supreme Court of Alaska which Petitioners request this Court to review was entered on March 24, 1981. That order denying discretionary interlocutory review is not a "final judgment or decree" within the meaning of 28 U.S.C. § 1257. The Alaska court has not yet rendered a decision on the issue presented by Petitioners. Dornier is still entitled to an appeal as of right to the state supreme court. Accordingly this Court lacks jurisdiction. This deficiency is analyzed *infra* at pages 6 to 7.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

In addition to the provisions and statutes cited in the Petition, the following relevant provisions are set forth in pertinent part in the Appendix hereto: 28 U.S.C. § 1257(3); Supreme Court Rule 28.1; Alaska Rule of Appellate Procedure 402.

STATEMENT OF THE CASE

A Skyservant aircraft designed, manufactured and sold by Petitioners Dornier crashed near Bethel, Alaska[1] on April 2, 1978. Respondent Sweaney instituted this wrongful death action against Dornier and others on several theories of liability.

Dornier moved to dismiss Sweaney's complaint for lack of personal jurisdiction. The extent and quality of Dornier's contacts with Alaska were the subject of lengthy briefs and supporting affidavits, as well as oral argument, considered by the trial court. Respondents established below that Dornier is a large manufacturer, producing several models of aircraft and distributing them worldwide. Dornier personnel have actively assisted marketing efforts in the United States. *See Elkhart Engineering Corp. v. Dornier Werke,* 343 F.2d 861 (5th Cir. 1965). Throughout the proceedings, Dornier has consistently referred only to its Skyservant, although Respondents showed the presence of at least one other model in Alaska.

Dornier acknowledged one sale of replacement aircraft parts to the Alaska owner of two other Skyservant aircraft. Respondents filed affidavits documenting additional contacts supporting jurisdiction. For example, several sales of replacement parts by Dornier occurred every year from 1973 through 1978, including one sale only two months after the plane crash near Bethel. As early as June 1974, Dornier initiated contact with Alaska Air Service, the first Alaska owner of the accident aircraft, and assigned a factory representative to provide it service and assistance. Dornier also sent technical documents concerning the aircraft to Alaska Air Service in Alaska. The flight manual found with the plane is dated "Edition 15 Feb 74 Rev 3 March 76," indicating it was updated in

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[1]Bethel is the economic hub of the Yukon-Kuskokwim Delta area of Alaska.

1976, two years after the plane reached Alaska. In addition, from February 1977 onward, Dornier furnished technical information to other owners.

During this entire time, Dornier was advertising in aviation publications calculated to reach a worldwide market. Affidavits established these advertisements were widely circulated within Alaska. Dornier's aircraft were described as in use "worldwide" and as well suited to use "under arctic conditions." Dornier advertisements also touted its products as "backed by a worldwide maintenance, logistics and aftersales service."

Dornier also undertook extensive efforts that resulted in Federal Aviation Administration issuance of a type certificate for Skyservant aircraft, necessary for marketing and use of this model aircraft in the United States. In documents submitted to the FAA to obtain certification, Dornier stressed that the Skyservant was specially designed for Arctic and Bush operations. Alaska is the only location in the United States where such conditions exist. Of the 107 Skyservants Dornier sold to nonmilitary customers, 2.8% (three aircraft) were ultimately based in Alaska. Those aircraft were used in Alaska with the knowledge and assistance of Dornier.

Finally, Dornier had a national distributor which sold at least one Skyservant into Alaska prior to the accident, and an authorized West Coast distributor at the the time of the accident. The latter distributorship agreement granted Land-Air Sales & Leasing, Inc. exclusive marketing rights in eight western states, including Alaska. Dornier argued below that this distributorship contract "never went into force" because it was later terminated by Dornier. Dornier's notice of that action to the distributor was mailed six weeks after the crash. It stated the agreement was being terminated effective sixty days after receipt, absent a cure by the distributor of the alleged breach. Dornier failed to show absence of a cure following

the letter of termination. While the distributorship was in effect, it was publicized in at least one journal of general aviation widely circulated in Alaska.

In spite of those numerous contacts, Dornier characterized its relationship with such phrases as "never conducted business within the state," "no agents," "no sales revenue from Alaska," and "no contact with the State of Alaska." It explained in detail the life history of the aircraft that crashed and referred to its unspecified marketing policy as evidence of the unforseeability of Alaska as a situs for litigation.

The Alaska trial court specifically relied on all the contacts brought to its attention in making its ruling. The trial court found Dornier's motion to reconsider to be without merit. Under Alaska law, an appeal may be taken only from a final judgment. Thus Dornier petitioned the Alaska supreme court to undertake discretionary interlocutory review of the personal jurisdiction issue. *See* Alaska Rule of Appellate Procedure 402.

Discretionary review was denied by order dated March 24, 1981, without any expression of opinion on the merits. It is this latter order Dornier seeks to have reviewed. Ninety days from the date of that order expired on June 22, 1981. On that date, Dornier submitted its Petition for Certiorari without an accompanying docket fee.[2] Payment of that fee, and subsequent docketing of the Petition by the United States Supreme Court Clerk, did not occur until July 8, 1981.

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[2]The Petition was defective in other respects as well. It omitted the list of related corporations which Supreme Court Rule 28.1 requires included in the first document filed on behalf of a corporate party to proceedings before the Court. That omission has not yet been corrected.

Further, the Petition requests a writ directed to the wrong court below. Even if the decision below were final, *but see* Section I *infra*, where a state supreme court declines to review a final judgment of a lower court, the writ should be directed to the lower court. *See* Faretta v. California, 422 U.S. 806 (1975).

REASONS FOR DENYING THE WRIT

I. The Issue Dornier Seeks To Have Reviewed Lacks Finality And Is Outside The Jurisdictional Requirements of 28 U.S.C. § 1257 Because The Alaska Court Merely Refused To Grant Discretionary Interlocutory Review Of A Pre-Trial Ruling, Did Not Expressly Or Implicitly Address The Merits Of Personal Jurisdiction And Did Not Foreclose That Issue From Subsequent Review Under Alaska's Procedural Rules.

The Court's appellate jurisdiction is generally limited by 28 U.S.C. § 1257 to a final judgment "rendered by the highest court of a State in which a decision could be had." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 476-77 (1975). The reasons for this rule include not only judicial efficiency but the "potential conflict between the courts of two different governments." *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945). "This requirement is not one of those technicalities to be easily scorned. It is an important factor in the smooth working of our federal system." *Id.* Four exceptions to the final judgment requirement have evolved, whereby the Court may review the highest possible state court's decision on the merits in the absence of a final judgment. *Cox, supra*, 420 U.S. at 477. Dornier cannot take comfort in any of the four categories because the Supreme Court of Alaska has not decided the personal jurisdiction issue. It has not issued a ruling final in either form or substance.

A threshold requirement of all four *Cox* exceptions is a final pronouncement on the federal issue by the highest possible state court. *Id.* It is clear the Alaska supreme court has not yet rendered a decision on the merits of the personal jurisdiction issue. A petition for review merely requests the supreme court to exercise its discretion to undertake early review of an issue.

Alaska Rule of Appellate Procedure 402(b). Denial of the petition neither expresses an opinion on the merits nor precludes Dornier from subsequent review of the issue through normal appellate channels. The personal jurisdiction question still may be raised on a later appeal of right. *Wolff v. Arctic Bowl, Inc.*, 560 P.2d 758, 763 (Alaska 1977). Thus Dornier in effect seeks a ruling that the Supreme Court of Alaska improperly failed to exercise its discretion in favor of special interlocutory review. When discretionary review is denied but the right exists to apply to the state court for further review, a writ of certiorari is inappropriate. *Costarelli v. Massachusetts*, 421 U.S. 193 (1975).

A second overriding factor in the *Cox* categories is the absence of any other federal issues to be resolved. In footnote 2 of its Petition, Dornier alludes to alleged conflict between Alaska discovery procedure and an international convention regarding the taking of evidence abroad, and implies Supremacy Clause issues.[3] The possibility of piecemeal review of another federal issue is a strong reason to deny certiorari. *Flynt v. Ohio*, 49 U.S.L.W. 4533 (U.S. May 18, 1981); *Cox, supra*, 420 U.S. at 477.

Dornier fails to come within any of the four *Cox* exceptions to the final judgment rule. Indeed, the Supreme Court of Alaska has not rendered a decision or in any way addressed the merits of the personal jurisdiction issue. The Petition must be denied due to this lack of finality and this Court's resultant lack of jurisdiction.

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[3]Dornier's footnote contains misstatements of fact and inaccuracies of law with regard to that second petition for review. Those deficiencies will not be further addressed since the issues raised therein are irrelevant to this Petition apart from their indication of other federal issues.

II. Due Process Requirements Are Clearly Satisfied When Jurisdiction is Asserted Over a Foreign Aircraft Manufacturer Whose Numerous Contacts With Alaska Include the Sale of Replacement Parts To Alaska Customers, Unsolicited Assistance to Alaska Owners of Its Aircraft, Extensive Advertisement in Alaska of its Product, Engagement of a Distributor Whose Territory Included Alaska, and Actual Knowledge That 2.8% of its Commercially Sold Aircraft Were Operated in Alaska.

The trial court's decision was correct. Due process is not offended by requiring Dornier to defend in Alaska when its product caused serious injury in the state and it had the numerous contacts shown below by the Respondents.

The Alaska long-arm statute authorizes jurisdiction over Dornier if its act or omission outside Alaska causes injury in Alaska and either of two additional parameters is satisfied: if solicitation and service activities were carried on in Alaska by or on behalf of Dornier, or if its products, parts and services were used in the state in the ordinary course of trade. Alaska Statute 09.05.015(a)(4)(A)&(B). Both those factors were present at the time of the crash.

The long-arm statute extends jurisdiction as far as possible within the confines of federal due process requirements. *Morrow v. New Moon Homes, Inc.*, 548 P.2d 279, 293 (Alaska 1976). The focus of the due process inquiry is whether the defendant has minimum contacts with the forum state adequate to satisfy notions of fair play and substantial justice.

World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291-92 (1980).[4]

Dornier approaches its "stream of commerce" argument as if that were the sole test of due process. The stream of commerce theory is only one method of showing minimum contacts adequate to satisfy notions of fair play and substantial justice. *Id.* at 295. In this case there are enough direct contacts that one need not reach the stream of commerce analysis of indirect contacts. Several times every year between 1973 and the date of the crash, Dornier sold parts to Alaskan owners of its aircraft. One such sale occurred within two months of the subject accident. Dornier admitte l actual knowledge its products were being operated in Alaska. Based on that knowledge, it contacted owners of the accident aircraft and provided service and technical assistance. Those sales of its products to Alaskans and contacts with Alaskan owners are direct contacts more than adequate to satisfy due process.

Jurisdiction is appropriate on the basis of the foregoing direct contacts without resort to the stream of commerce theory. If the latter theory alone were utilized, however, due process would still be satisfied. A defendant with no direct contacts with a state is still subject to jurisdiction if its indirect conduct and connections "are such that [it] should reasonably

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[4]Dornier erroneously discusses reasonableness as if it were a distinct test of due process. Reasonableness is not a separate hurdle to jurisdiction after minimum contacts are established, but is merely an alternative phrase to "fair play and substantial justice." World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291-92 (1980). In addition, Dornier made no showing of any particular difficulty in defending this action. Finally, Dornier's argument ignores the interests of the forum state and the victims of its defective aircraft. *See id.* at 292; Packard v. Cessna Aircraft Co., 366 F. Supp 966 (D. Alaska 1973). The mere existence of a possible alternative forum more convenient to a defendant is not sufficient to divest a local court of jurisdiction. Bach v. McDonnell Douglas, Inc., 468 F. Supp. 521 (D. Ariz. 1979).

anticipate being haled into court there." *Id.* at 297. Dornier has numerous indirect contacts that satisfy that standard.

Under *World-Wide*, a primary consideration is the expectation of the manufacturer with respect to products placed into the stream of commerce. *Id.* at 298. Dornier clearly had the expectation its products would be purchased and used by Alaskans. It had actual knowledge its products were being used in Alaska. It provided parts and took other affirmative steps to facilitate that use.

Dornier engaged in worldwide advertising of the Skyservant aircraft. Those advertisements were calculated to reach Alaska and did so. They touted the fact Dornier's "products are backed by world-wide maintenance, logistics and aftersale service." Dornier provided such service to Alaskan owners of its aircraft. To facilitate use of its aircraft within Alaska, it provided technical information, technical specifications and flight manuals. It assigned a factory representative to Alaskan owners to assist with technical problems and supply needed parts. When replacement parts were necessary, it sold them to Alaskans. It makes no difference where title passes or that Dornier may have sold its goods "F.O.B." *See Oswalt v. Scripto, Inc.*, 616 F.2d 191, 197 n.8 (5th Cir. 1980). Dornier knew the destination of those parts and clearly expected their use in Alaska.

Dornier actively pursued the United States market. It successfully undertook the extensive efforts necessary to obtain an FAA type certificate. This certification was necessary so the Skyservant could be marketed and used in the United States. Its advertisements and the documents submitted to the FAA stressed its suitability for Bush and Arctic operations. The only location where such conditions exist in the United States is Alaska. It had at least two distributors in the United States. The early one was a national distributor who engaged

in extensive nationwide advertising. That distributor sold at least one aircraft into Alaska. Subsequently, a California firm was given an exclusive distributorship for the West Coast. The distributorship agreement specifically stated Alaska was a portion of that territory. When coupled with the accident, these indirect contacts are more than adequate under the stream of commerce theory set forth in *World-Wide.*

The trial court relied on both the direct and indirect contacts in denying Dornier's motion. Dornier continues to ignore these undisputed contacts and utilizes selected portions of *World-Wide* to argue for the opposite result. *World-Wide,* however, did not deal with the manufacturer of a product. The defendants in question were a local distributor and retailer whose activities were confined to a three-state area remote from the forum. Plaintiffs attempted to base jurisdiction *solely* on the occurrence of the accident in the forum state. The Court repeatedly pointed out that there was no activity whatsoever that was directly or indirectly connected with the forum state. There was no advertising reasonably calculated to reach the forum. Nor was there any evidence the distributors had served or sought to serve the forum. 444 U.S. at 289, 295. The Court found jurisdiction inappropriate because there were absolutely no "contacts, ties, or relations" with the forum state. *Id.* at 299. Dornier certainly cannot avail itself of that description. It is consistent with *World-Wide* to subject Dornier to jurisdiction in Alaska.

CONCLUSION

The Petition was not filed in compliance with Court rules. It does not come within the Court's jurisdiction because the Supreme Court of Alaska has not ruled upon the question presented. In the absence of those deficiencies, the Petition still would be inappropriate. It presents no new issues of national importance, but asks the Court to resolve facts unique

to this litigation. It addresses well-established legal principles recently reiterated by the Court. The trial court properly applied those principles in analyzing Dornier's numerous direct and indirect contacts with Alaska.

For all the foregoing reasons, Respondent Sweaney respectfully requests the Court to deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX

Statutes

28 U.S.C. § 1257

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

. . . .

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

Rules

United States Supreme Court Rule 28.1

.1. . . . Any document, except a joint appendix or a brief *amicus curiae*, filed by or on behalf of one or more corporations, shall include a listing naming all parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of each such corporation. This listing may be done as a footnote.

Alaska Rule of Appellate Procedure 402

(a) **When Available.**

(1) An aggrieved party, including the state of Alaska, may petition the appellate court as provided in Rule 403 to review

any order or decision of the trial court, not appealable under Rule 202, in any action or proceeding, civil or criminal.

(2) A petition for review shall be directed to the appellate court which would have jurisdiction over an appeal from the final judgment of the trial court in the action or proceeding in which it arises.

(b) **When Granted.** Review is not a matter of right, but will be granted only where the sound policy behind the rule requiring appeals to be taken only from final judgments is outweighed because:

(1) Postponement of review until appeal may be taken from a final judgment will result in injustice because of impairment of a legal right, or because of unnecessary delay, expense, hardship or other related factors; or

(2) The order or decision involves an important question of law on which there is substantial ground for difference of opinion, and an immediate review of the order or decision may materially advance the ultimate termination of the litigation, or may advance an important public interest which might be compromised if the petition is not granted; or

(3) The trial court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by an inferior court or administrative tribunal, as to call for the appellate court's power of supervision and review; or

(4) The issue is one which might otherwise evade review, and an immediate decision by the appellate court is needed for the guidance of the lower courts or is otherwise in the public interest.

No. 81-34

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ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

DORNIER GMBH, a German corporation, *Petitioner,*

v.

DONALD E. ELLIOTT and EVELYN L. ELLIOTT, individually and as Personal Representative of the Estate of SCOTT V. ELLIOTT, Deceased, BUSH AIR, INC., an Alaska corporation, and WIEN AIR ALASKA, INC., an Alaska corporation, *Respondents.*

DORNIER, A. G., and DORNIER, GMBH, *Petitioners,*

v.

AVONNA L. SWEANEY, Personal Representative of the Estate of GARY B. ROBERTS, BUTLER AVIATION COMPANY, HOME OIL COMPANY, FIELD AVIATION COMPANY, LIMITED, CLIFFORD L. SHORT, RAY E. FERGUSON, FRANK P. FERGUSON, DON FERGUSON, JOE FERGUSON, DON'S SAFARI FLYING SERVICE, KOTZEBUE FLYING SERVICE, INC., ALASKA CENTRAL AIRWAYS, INC., GEORGE GRANT, and AIRPARTS, INC., *Respondents.*

DORNIER, A. G., and DORNIER, GMBH, *Petitioners,*

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALASKA

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALASKA

ARGUMENT

I. The State of Alaska Has Ignored The Requirement That Dornier Have Sufficient Minimum Contacts With The State Of Alaska Before Jurisdiction May Be Asserted.

The briefs filed by respondents make a number of broad factual allegations,[1] but ignore the irrelevance of these alleged facts with regard to the claimed jurisdiction. Among the allegations presented is one which characterizes Dornier as a large manufacturer which produces several modes of aircraft. There is no denial that Dornier has manufactured various models of aircraft in Germany for some time, but that fact does not constitute a contact with the state of Alaska nor does it demonstrate that Dornier's marketing efforts included Alaska within its ambit.[2]

The essential distinction that must be made between the position that has been advanced by respondents, and that which is reflected in the decisions of this court, as well as the Supreme Court of the State of Alaska, is that use of a product within a state is not sufficient for jurisdiction where that use is not the consequence of marketing efforts of the defendant.[3] It

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[1] They also set forth several procedural challenges as well. In response, the docketing fee has been paid and has no impact on the date of filing. As discussion in section II, the Alaska Supreme Court decision is, in all practicality, final, and the petition is therefore appropriately directed to it. Finally, a list of parent, affiliate, and subsidiary corporations has been requested from Germany and will be filed upon receipt.

[2] Respondents contend that Dornier "actively assisted marketing efforts in the United States," but stop short of suggesting that a single SkyServant has ever been sold in the United States. Indeed, the phrasing of respondents' statement suggests their acceptance of the fact that Dornier has not itself marketed its product in the United States, and that the presence of Skyservant aircraft in Alaska is the fortuitous consequence of random resale activities.

[3] Dornier is not seeking a factual redetermination, but rather challenges that standard used by the Alaska courts in finding jurisdiction. The appropriate standard, ignored in the decisions below, requires

remains uncontested by any of the respondents that Dornier has never sold this product within the State of Alaska, or within the United States.

It cannot be contended that Dornier placed the aircraft into the stream of commerce in such a manner that the aircraft would be sold within the State of Alaska, or within the United States. This conclusion is apparent from the fact that Dornier has never shipped this aircraft to any part of the United States for sale to any customer. Neither did Dornier ship a single one of these products to any distributor who sold that product to anyone within the United States. The presence of these aircraft in the United States is not the consequence of Dornier's marketing of its product, but is the consequence of random resale activities of parties not associated with the petitioner Dornier.

Respondents contend that Dornier is subject to jurisdiction in the State of Alaska by virtue of direct contacts with the State of Alaska. It has been recognized that a nonresident cannot be held to general jurisdiction within a forum unless he has substantial contacts with that forum. *Amba Marketing Systems, Inc.* v. *Jobar International, Inc.*, 551 F.2d 784 (9th Cir. 1977). Where the contacts with the state are not sufficient to subject it to general jurisdiction within that state, then *the claim asserted must be one which arises out of,* or results from, *the defendant's activities within the forum. Ibid.* Even if one were to assume that the contacts alleged of Dornier by respondents were accurate, those contacts would consist of items such as the sale of replacement parts to other Alaskan entities which were consummated in Germany,[4] the distribution of technical

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that forseeability of injury resulting from a product be considered in connection with marketing by the defendant. Where the defendant sells no product destined for a particular forum, or designated for resale in the forum, it simply cannot be charged with the required level of forseeability.

[4] Respondent's contention that the location where title passes is irrelevant is inconsistent with decisions which permit a manufacturer

information to owners of Skyservant aircraft, advertisements which failed to result in the sale of single aircraft in the United States, knowledge by Dornier of the presence of certain Skyservant aircraft within the State of Alaska, etc. It has not, and cannot, be claimed that the injuries alleged were a consequence of a single one of these alleged contacts with the State of Alaska.

While the respondents have suggested, as above, that Dornier is subject to jurisdiction in Alaska by virtue of its direct contacts, their primary argument, and the one relied upon by the courts of the State of Alaska, rests upon the stream of commerce theory of jurisdiction. This court discussed that theory as permitting a forum to assert jurisdiction over a foreign corporation where that corporation "delivers its product into the stream of commerce with the expectation that they will be purchased by customers in the forum state." *World-Wide Volkswagen* v. *Woodsen*, 444 U.S. 286 (1980), 100 S.Ct. 559, 567 (1980). Respondents apparently contend that it makes no difference whether the product reaches a particular user through the sale by the manufacturer's distributors, or whether it be the second, third, tenth, hundredth, or thousandth resale of that particular product. That proposition has been specifically rejected by this court, when it stated that, "The mere unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum state." *Id.* at 567.

Even if one were to accept respondents' premise that Dornier's marketing activities included efforts to sell its product in Alaska, it is clearly established that those efforts were unsuccessful. Without the sale of a single Skyservant aircraft in Alaska, it is impossible to reasonably suggest that Dornier could forsee, through its marketing efforts, that Skyservant aircraft would be used in Alaska. Determinations as to

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to direct its marketing activities in such a fashion as to avoid significant contacts with a particular forum, and thereby be free of jurisdiction within that forum.

whether Dornier contacted the FAA for the purpose of qualifying its aircraft for use in the United States, whether its advertising was carried in publications that were distributed in the United States, whether it supplied technical information to owners of Skyservant aircraft wherever they may be, indeed, even whether or not Dornier had distributors within the United States, all become irrelevant if the alleged marketing efforts failed to lead to the sale of a single product within the forum. For when a manufacturer knows that it has not sold a single product within the forum, and where it is making no efforts to sell that product within the forum, it is simply not forseeable to it that its marketing of the product will result in sales within that forum.

No aircraft has ever reached the State of Alaska through Dornier's marketing efforts. Dornier has never sold an aircraft to a distributor for resale to a customer within Alaska. Dornier has no direct contact with the State of Alaska, nor does it have indirect contacts which would make it forseeable that any of its aircraft would be marketed in the State of Alaska. Subjection of Dornier to personal jurisdiction in the State of Alaska would be an abandonment of all limitation on personal jurisdiction over foreign manufacturers, and would be inconsistent with the Constitution of the United States and the decisions of this court.

II. The Courts Of The State Of Alaska Have, In Violation Of The Constitutional Limitations On Personal Jurisdiction, Determined That Dornier Can Be Subjected To Trial In Alaska, By A Decision From Which Dornier Has No Effective State Remedies.

Respondents have argued, and it cannot be denied, that further review by the Supreme Court of Alaska would be possible, if necessary, following trial on the merits. Dornier's contention, however, is that courts of the State of Alaska have no right to subject it to *trial* in Alaska, and insofar as the determination of whether proceedings in Alaska will continue, the matter has been finally decided by the highest court in the state.

The existence of exceptions to the rule of finality is well known, and some discussion of exceptions to the finality rule was presented in the briefs of respondents. It is clear that the court has adopted a pragmatic approach to considering questions of finality, and has found finality to exist despite the continuation of proceedings in the lower courts in a number of situations. Dornier submits that just such a situation is presented by its petition for certiorari, and that the courts of Alaska have determined with finality that proceedings will continue before the courts of that state.

In *Mercantile Nat'l Bank at Dallas* v. *C. H. Langdeau Republic Nat'l Bank of Dallas,* 371 U.S. 557 (1963), this court permitted appeal in order to determine a venue question in advance of trial on the merits. It was stated, at 558:

> This is a separate and independent matter, anterior to the merits and not enmeshed in the factual and legal issues comprising the plaintiff's cause of action. Moreover, *we believe that it serves the policy underlying the requirement of finality in 28 U.S.C.* § 1257 to determine now in which state court appellants may be tried rather than to subject them, and appellee, *to long and complex litigation which may all be for naught if consideration of the preliminary question of venue is postponed* until the conclusion of the proceedings. [Emphasis Added.]

The same concern for unnecessary litigation was voiced by Dornier in its original petition.

This is a matter where Dornier is contesting the right of the courts of Alaska to subject it to jurisdiction, and is separate and apart from the question of whether Dornier may or may not be liable on the merits. This court has recognized that where there is a final decision as to whether or not a matter will proceed before a court, and where the petitioner seeks certiorari on the question of validity of continuing proceedings, jurisdiction is proper under 28 U.S.C. § 1257. *Harris* v. *Washington,* 404 U.S. 55 (1971). In *Harris,* the State of Washington attempted to try the petitioner on charges of murdering Mark Allen Harris and assaulting Laila Violet Harris after he had been acquitted of the murder of Ralph Burdick, despite

the fact that all of the claims related to a single bomb explosion. Petitioner sought certiorari after the State of Washington had decided that a second trial was permissible, and this court considered that decision final and granted certiorari despite the fact that the second trial could have resulted in the acquittal of the petitioner.

In *American Motorist Ins. Co.* v. *Starnes*, 425 U.S. 661 (1976), the peititioner challenged a ruling of the Court of Civil Appeals of Texas relating to a venue statute, and sought certiorari from the United States Supreme Court after the denial of its application for a writ of error by the Supreme Court of Texas. This court concluded that finality existed, stating in footnote 3 on page 642:

> Appellant has invoked this court's jurisdiction under 28 U.S.C. §1257(2), which requires that the judgment for which review here is sought be final. For the reasons stated in *Mercantile Nat'l Bank* v. *Langdeau*, 371 U.S. 555, 558, 83 S.Ct. 520, 522, 9 L.Ed.2d 523, 526 (1963), the judgment presently before the court is final for purposes of section 1257(2).

The question presented in *Starnes* is remarkably similar to the one presented here. In both, the question related to whether the court in which the litigation was proceeding had a right to conduct that litigation, and in both an adverse decision had been rendered by the trial court. In both situations, the petitioner first sought review by the respective state supreme court, and in both situations, the state supreme court declined to provide that review. Just as this court found that finality existed with regard to Starnes, this court should find that finality exists with regard to the decisions from which Dornier seeks certiorari.

Dornier is presently confronted with the unenviable position of either complying with an erroneous series of orders by courts of the State of Alaska, which will effectively circumvent the constitutional impediments on the over-zealous assertion of jurisdiction by state courts, or, alternatively, to refuse to comply with the orders relating to jurisdiction in Alaska, and

suffer the consequences of a default judgment. The chilling effect of this impossible decision is manifestly apparent, and permits Dornier to rely upon constitutionally mandated protections only if it will first run the gauntlet of potential sanctions to be levied upon it. To conclude that Dornier can obtain effective relief by appealing any adverse decision on the merits following trial is to subject it to the overwhelming burden and hardship[5] of participation in a trial that is constitutionally prohibited, and to effectively emasculate the constitutional protections that are sought.

Concern for litigants who are placed in untenable positions by virtue of on-going lower court proceedings has been voiced before. In *Rosenblatt* v. *American Cyanamid Co.*, 86 S.Ct. 1 (1965), Mr. Justice Goldberg argued, at 3:

> . . . [A] litigant should not be forced to take the risk of a default judgment to obtain the benefits which national policy . . . is designed to afford him.

Though Justice Goldberg refused to grant the stay requested in *Rosenblatt*, the concerns expressed therein are equally applicable in the petition submitted by Dornier.

The courts of the State of Alaska have, in effect, rendered a final decision with respect to the question of whether Dornier can be subjected to trial in Alaska, and Dornier will be deprived of the constitutional protections of due process lest this court grant certiorari as sought by the petitioner. Immediate review is necessary in order to avoid the erosion of the federal policy relating to jurisdictional safeguards as has been enunciated by this court, most recently in *World-Wide Volkswagen* v. *Woodsen, supra.*

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[5] Despite respondent's characterization of Bethel, Alaska, it is small, it is remote, it is predominantly Native, and it is inaccessible by road, even from other communities in Alaska.

CONCLUSION

Dornier respectfully submits that for all practical purposes the decision of the courts of the State of Alaska are final with respect to the question of whether Dornier can be subjected to jurisdiction in the State of Alaska, and no further meaningful state review is available. The courts of the State of Alaska have violated the petitioners' right to due process of law, and have ignored this court's pronouncements upon the question of jurisdiction. In the absence of a grant of certiorari by this court, defendant Dornier will effectively be deprived of due process, and the federal policies relating to limitations on jurisdiction will be subverted.

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